

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

MARK A. SCHENA,

Defendant.

Case No. 5:20-cr-00425 EJD

ORDER ON RESTITUTION

On October 18, 2023, the Court sentenced Defendant Mark A. Schena to 96 months in custody, three years' supervised release, a \$900 special assessment, and ordered \$24,626,136 in restitution. ECF No. 252.

In ordering restitution, the Court accepted the Probation Officer's recommendations in the Presentence Investigation Report ("PSR") as well-founded. 10/18/23 Hr'g Tr. 89:17–24. The PSR had found that healthcare programs sustained actual losses of \$2,727,240, and that Arrayit shareholders suffered losses of \$21,898,896. PSR ¶ 50. On restitution, the government need only prove the victims' actual loss amount by a preponderance of the evidence to allow the Court to estimate the losses with "some reasonable certainty." *United States v. Holmes*, 2023 WL 3489320, at *2 (N.D. Cal. May 16, 2023) (quoting *United States v. Kennedy*, 643 F.3d 1251, 1261 (9th Cir. 2011)).

In ordering restitution, the Court found the healthcare program's \$2,727,240 loss amount to be supported by the preponderance of the evidence, as even Mr. Schena acknowledged that the total amount that Arrayit allegedly obtained from private and public insurers, per the government's trial evidence, "was approximately \$2.7M." Def. Sent'g Mem. 19. With respect to the \$21,898,896 loss amount sustained by Arrayit investors, the Court found that the spreadsheet

1 appended to the Government's Sentencing Memorandum as Exhibit A contained sufficient detail
2 to estimate the investment amounts made by Arrayit investors. Gov't Sent'g Mem. 35, Ex. A, Ex.
3 4. The specific amounts enumerated in the Government's spreadsheet established, by a
4 preponderance of the evidence, both the specific investor victims and the full amounts of their
5 losses with "some reasonable certainty." *Kennedy*, 643 F.3d at 1261. Accordingly, the Court
6 found that the preponderance of the evidence supported a restitution order in the amount of
7 \$24,626,136, consistent with the PSR's recommendation.

8
9 Dated: November 17, 2023


EDWARD J. DAVILA
United States District Judge

United States District Court
Northern District of California